PETITION NOT PRINTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 115

STEPHEN FRANKLIN REYNOLDS, PETITIONER

vs.

H. G. COCHRAN, JR.,
DIRECTOR OF DIVISION OF CORRECTIONS,
FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF FLORIDA

PETITION FOR CERTIORARI FILED OCTOBER 9, 1959
CERTIORARI GRANTED MAY 31, 1960

Supreme Court of the United States

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No. 115

STEPHEN FRANKLIN REYNOLDS, PETITIONER

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H. G. COCHRAN, JR.,
DIRECTOR OF DIVISION OF CORRECTIONS,
FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF FLORIDA

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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STEPHEN FRANKLIN REYNOLDS, PETITIONER

vs.

STATE OF FLORIDA, H. G. COCHRAN, DIVISION OF CORRECTIONS, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS—Filed July 28, 1959

COMES NOW YOUR PETITIONER

Stephen Franklin Reynolds, into this Honorable Court, a Citizen of the United States of America, State of Florida, in proper person and without counsel seeking Writ of Habeas Corpus.

It is verily believed by your petitioner that there is meritorious cause to petition this Honorable Court for Writ of Habeas Corpus.

Your petitioner contends that as a citizen of the United States, he is intitled to any and all amendments of the constitution and bill of rights of the United States and the State of Florida, made and provided to protect and safe guard his personal freedom and liberty.

Your petitioner was convicted of the crime of being a "second offender" on the 20th day of February 1958 in the criminal court of record in and for the County of Polk, Florida, and sentenced to Ten (10) years in the State Prison at Raiford Florida for the afore said crime of being a "second offender".

The body and person of your petitioner, Stephen Franklin Reynolds is presently under sentence, at Avon Park Correctional Institution, Avon Park, Florida. Further that he is being held, detained and deprived of his personal freedom without due process of law, further that the trial court violated his Constitutional rights and the fundamental fairness that is so essential to the very concept of justice.

Wherefore, your petitioner having no other remedy, prays unto this Honorable Court for Writ of Habeas Corpus to issue on grounds as follows.

Your Petitioner was informed against as a "second offender" on February 13, 1958, notwithstanding the fact that he had completed a two (2) year sentence and had obtained his freedom by expiration of the afore said two (2) year sentence.

Your petitioner at that time was free and living a normal, useful life, completely unaware that his personal freedom was in jeopardy until he was informed against under Florida Statute 775-09.

[fol. 2] Your petitioner contends that it should not be the duty of the trial courts and or lower courts to conjure hippothetical situation to which the statute conceivably might be applied to and if so applied might be unconstitutional. In the case of Mussa C. Batch vs. State of Florida in a recent ruling, this Honorable Court ruled that a person is entitled to know just when in his life he is no longer subject to the power of the court to translate his liberty to inprisonment. In the instant case how can your petitioner know when in his life he is no longer subject to have his liberty translated to imprisonment, even after expiration of the present sentence, can he again be imprisoned without committing another crime as in the instant case?? Surely this Honorable Court will not condone this practice, as it is against and in direct conflict with the afore mentioned ruling.

Your petitioner contends that the conviction related to in the information was had in May 1934 thus it cannot be used to charge "second offender", as the afore mentioned statutes were not in effect until 1957 and therefore would tend to make the information fatally defective.

Your petitioner further contends that the trial court was again in error when at the time of trial the court failed to deduct from the new sentence the time served on previous two (2) year sentence, which was completed prior to the "second offender" charge. However, this two (2) years was later applied to the present sentence

in a Habeas Corpus hearing in 10th Judicial Circuit at Bartow Polk Florida and is not being contested. The judgment of the trial court reads precisely as follows, "The court adjudges you Stephen Franklin Reynolds, to be guilty of the offense of second offender. Order and judgement of the court that you Stephen Franklin Reynolds for your said offense be confined in the State Prison of Florida, at hard labor for the period of ten (10) years.

Your petitioner contends that the proceedings had against him were willfully wrong, false malicious and without valid process of legal authority, further that Florida Statute 775-09 were not meant to be construed so as to make it an offence or crime for a person to have been convicted more than once. If the said statute does in effect make it an offence or a crime to have been convicted more than once, then the statute 775-09 would create a public offence and an ever present threat to ones personal liberty;

Thus your petitioner contends that he is now being held under a sentence, order and judgment, based on a charge that does not constitute an offense or a crime in this state.

Article V Constitutional amendments of the Bill of Rights of the United States of America; so states in part: nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any Criminal case to be wittness against himself. Hence, your petitioner contends that his constitutional rights were abridged in the instant case, inasmuch as he was compelled to be a wittness against himself, and further, was put in jeopardy again for a crime committed in 1934 for which your petitioner served in prison until expiration.

Your petitioner contends that article I section 9 paragraph 3 of the Constitution would in effect, bar the 1934 Conviction and make it illegal to charge your petitioner with "second offender" relative to the said Conviction [fol. 3] of 1934. Ex-post facts, related to in afore said article I section 9 and 10, forbids the passage of any law that makes a deed a crime that wasn't a crime before.

Your petitioner contends that this means at any time we can do all the law permits for, even if at a later date these things are made illegal. The law cannot be dated back to make illegal anything that was done before the law was passed. Hence; your petitioner contends that in 1934 there was no charge existing of "second offender" and further that no two convictions could be combined to make a third offense applicable to a person, thus subjecting him to imprisonment without his committing another crime.

Your petitioner would show this Honorable Court that at the time of his arrest he was living in Valusia County, DeLand Florida, that he was arrested without a warrant, that he was arrested on strength of a pick up order from Sheriff Office, Bartow, Polk County, Florida, that the arresting officer, a deputy sheriff of Volusia County did not know why he was arresting your petitioner and did not have a warrant to make a legal arrest, further that your petitioner was taken against his will across five (5) county lines. The said county lines being Volusia, Seminole, Orange, Osceala, into Polk County all of State of Florida, without his knowing why he was arrested or the arresting officer knowing why or what charge he was making arrest for; Your petitioner, was taken across the afore said counties by the arresting officer, a deputy sheriff of Volusia County, Florida.

Your petitioner contends that once he was in the clutches of the Criminal Court of Record in and for Polk County Florida; he was a convicted person before he was ever tried.

To support the above statement your petitioner would show that he was forced to go before the court against his will; that once before the court your petitioner informed the court that he then had legal counsel on the way to represent him in what ever charge may be; a better discription of afore said known by Mrs. Sadie M. Bradley, 317 West Minnesasata Avenue, DeLand Volusia County, Florida, and, D. C. Laird; attorney at Law; Lakeland Polk Florida. That petitioner had been arrested on the 18th day of February 1958 in Valusia County, and his attorney was to arrive this morning this date being the 20th day of February 1958, that after being so in-

formed "the trial court so stated to your petitioner "you do not need counsel in this case". Counsel would not be of any assistance you your petitioner, "No point in calling a Doctor to a man already dead."

The trial court then proceeded to read off two (2) convictions from your petitioners record and then asked, You are guilty of these two convictions, are you not? Petitioner saying yes your Honor, but the court, I find, you guilty of being a "second offender" and sentence you Stephen Franklin Reynolds to ten (10) years in State Prison at Raiford Florida:

Your petitioner further contends that if a person can be informed against and sentenced to prison at any time after a second offender conviction. Whether the said person is in prison or otherwise, then a person whom has been twice or more convicted can never in his life time be out from under jurisdiction of the translate his liberty to imprisonment. Your petitioner contends that his constitutional rights were abridged, that he is now being detained and deprived of his freedom illegaly and without just cause;

Wherefore your petitioner, Stephen Franklin Reynolds prays unto this Honorable Court for Writ of Habeas Corpus to issue.

PETITIONER SHALL EVER SO PRAY

• • • •

[fol. 4] *Duly sworn to by Stephen Franklin Reynolds, jurat omitted in printing.*

[fol. 5] IN THE
CRIMINAL COURT OF RECORD IN AND FOR
POLK COUNTY, FLORIDA

Case No. 21181

STATE OF FLORIDA, PLAINTIFF

vs.

STEPHEN FRANKLIN REYNOLDS, ALIAS FRANK REYNOLDS, ALIAS FRANKLIN REYNOLDS, ALIAS STEPHEN F. REYNOLDS, ALIAS S. F. REYNOLDS, DEFENDANT

ORDER SETTING ASIDE SENTENCE PREVIOUSLY IMPOSED HEREIN ON FEBRUARY 20, 1958, AND ENTERING NEW SENTENCE—August 25, 1958

It appearing from the records herein that the defendant, Stephen Franklin Reynolds, alias Frank Reynolds, alias Franklin Reynolds, alias Stephen F. Reynolds, alias S. F. Reynolds, was by this Court on the 20th of February, 1958, senteneed to serve ten years in the State Prison, commitment having been issued in connection with said sentence on February 21, 1958; and The Court now having been furnished with the Order issued by the Honorable Gunter Stephenson one of the Circuit Judges in and for the Tenth Judicial Circuit of Florida in connection with a Writ of Habeas Corpus wherein it is Ordered that the defendant, Stephen Franklin Reynolds, alias Frank Reynolds, alias Franklin Reynolds, alias Stephen F. Reynolds, alias S. F. Reynolds, be brought before this Court for the entry of a proper sentence in accordance with said Order;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Order of the Criminal Court of Record in and for Polk County, Florida, wherein the defendant, Stephen [fol. 6] Franklin Reynolds, alias Frank Reynolds, alias Franklin Reynolds, alias Stephen F. Reynolds, alias S. F. Reynolds, was, on February 20, 1958, sentenced to serve ten years in the State Prison at Raiford, Florida, be,

and it is hereby, ordered cancelled, set aside and declared to be of no further force and effect whatsoever.

It Is Furthur Ordered, Adjudged and Decreed that you, the defendant Stephen Franklin Reynolds, alias Frank Reynolds, alias Franklin Reynolds, alias Stephen F. Reynolds, alias S. F. Reynolds, in compliance with the Order of Honorable Gunter Stephenson one of the Circuit Judges in and for the Tenth Judicial Circuit of Florida entered on the 5th day of August, 1958, be, and you are hereby, sentence to serve ten years in the State Prison at Raiford, Florida, and the proper authorities of the State Prison be, and they are hereby Ordered to give you credit in connection with this sentence for all times served in connection with the sentence imposed against you by this Court on the 10th of May, 1956, wherein you were convicted of the crime of Grand Larceny, and further that you be given credit for any and all time previously served in connection with the sentence entered by this Court in this case on February 20, 1958, which sentence is herein being set aside and cancelled, together with any gain time or other credit to which you may be entitled in the premises.

Done and Ordered at Bartow, Polk County, Florida, this the 25th of August, A. D. 1958.

/s/ Roy H. Amidon
Judge

[fol. 7] IN THE
CRIMINAL COURT OF RECORD, IN AND FOR
POLK COUNTY, FLORIDA

S-3703-K

No. 21181

STATE OF FLORIDA

vs.

STEPHEN FRANKLIN REYNOLDS, alias FRANK REYNOLDS, alias FRANKLIN REYNOLDS, alias STEPHEN F. REYNOLDS, alias S. F. REYNOLDS

INFORMATION FOR SECOND OFFENDER

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA

CLIFTON M. KELLY, County Solicitor for the County of Polk, prosecuting for the State of Florida in said County, under oath, information makes that STEPHEN FRANKLIN REYNOLDS, alias FRANK REYNOLDS, alias FRANKLIN REYNOLDS, alias STEPHEN F. REYNOLDS, alias S. F. REYNOLDS

of the County of Polk and State of Florida, on the 13th day of February in the year of our Lord, one thousand nine hundred and fifty-Eight, in the County and State aforesaid,

having heretofore been on the 30th day of May, in the year of our Lord, One Thousand Nine Hundred and Thirty-Four convicted of the crime of robbery, a felony under the laws of the State of Florida, in the Criminal Court of Record of Polk County, Florida and was by said Court sentenced to serve a term of Five (5) years in the State Prison, which said judgment was not reversed, and he, the said STEPHEN FRANKLIN REYNOLDS, alias FRANK REYNOLDS, alias ~~FRANKLIN~~ REYNOLDS, alias ~~STEPHEN~~ F. REYNOLDS, alias S. F. REYNOLDS, having been on the 10th day of May in the year of our Lord One Thousand Nine Hundred and Fifty-Six convicted of the crime of grand larceny, a felony under the laws of the

State of Florida, in the Criminal Court of Record of Polk County, Florida and was by said court sentenced to serve a term of two (2) years in the State Prison, which said judgment was not reversed; THEREFORE, the said STEPHEN FRANKLIN REYNOLDS, alias FRANK REYNOLDS, alias FRANKLIN REYNOLDS, alias STEPHEN F. REYNOLDS, alias S. F. REYNOLDS, has been convicted of two (2) felonies under the laws of the State of Florida, contrary to Section 775.09, Florida Statutes, 1957.

[fol. 8] contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida.

/s/ Clifton M. Kelly
County Solicitor, Polk County, Florida

STATE OF FLORIDA)
COUNTY OF POLK)

Personally appeared before me, Clifton M. Kelly, County Solicitor for Polk County, Florida, who being first duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which if true, would constitute the offense therein charged.

/s/ Clifton M. Kelly
County Solicitor

Sworn to and subscribed before me this 13th day of February, A. D. 1958.

/s/ Robert J. Haslett
Clerk of the Criminal Court of Record
By D. C.

Presented by the County Solicitor and filed Feb. 13, 1958.

/s/ Robert J. Haslett
Clerk of the Criminal Court of Record

Defendant arraigned in open court and to the within information pleaded

This day of A. D. 19

Clerk of the Criminal Court of Record
Polk County, Florida

WITNESSES FOR THE STATE

Capias Ordered & Issued.
Bond set at
$5,000.00—
Returnable at
Feb. 17, 1958
at 10:00 a. m.

[fol. 9] IN THE
CRIMINAL COURT OF RECORD IN AND FOR
POLK COUNTY, FLORIDA

No. 21181 SECOND OFFENDER

STATE OF FLORIDA

vs.

STEPHEN FRANKLIN REYNOLDS, alias FRANK REYNOLDS, alias FRANKLIN REYNOLDS, alias STEPHEN F. REYNOLDS, alias S. F. REYNOLDS.

JUDGMENT AND SENTENCE—February 20, 1958

Pursuant to capias having been order and issued on February 13, 1958, the Defendant in the above entitled cause appearing this day before the Court and being duly arraigned, did then and there freely and voluntarily plead guilty to the Information filed in said cause, and being asked by the Court if he had anything to say why the sentence of the law should not be passed upon him, offers nothing in bar thereto.

THEREFORE, the Court adjudges you, Stephen Franklin Reynolds, alias Frank Reynolds, alias Franklin Reynolds, alias Stephen F. Reynolds, alias S. F. Reynolds, to be guilty of the offense of Second Offender, you having been convicted of two (2) felonies under the laws of the State of Florida, contrary to Section 775.09, Florida Statutes, 1957, for which you stand convicted on your plea, and it is the sentence, order and judgment of the Court that you, Stephen Franklin Reynolds, alias Frank Reynolds, alias Franklin Reynolds, alias Stephen F. Reynolds, alias S. F. Reynolds, for your said offense, be confined in the State Prison of Florida at hard labor for a term of Ten (10) Years.

THIS February 20, A. D. 1958

[fol. 10] IN THE
SUPREME COURT OF FLORIDA

STEPHEN FRANKLIN REYNOLDS, PETITIONER

vs.

H. G. COCHRAN, JR., Director of Division of Corrections, RESPONDENT

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—September 15, 1959

The above-named petitioner has filed a petition for writ of habeas corpus to be issued to the respondent in the above entitled cause, and upon consideration thereof, it is ordered that said petition be and the same is hereby denied.

• • • •

[fol. 11] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 12] SUPREME COURT OF THE UNITED STATES

No. 384, Misc., October Term, 1959

STEPHEN FRANKLIN REYNOLDS, PETITIONER

vs.

H. G. COCHRAN, JR., Director of Division of Corrections

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—May 31, 1960

ON CONSIDERATION of the motion for leave to file a petition for writ of habeas corpus herein,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, denied.

Treating the papers submitted as a petition for writ of certiorari, certiorari to the Supreme Court of the State of Florida is granted. The petitioner is permitted to proceed in forma pauperis and the case is transferred to the appellate docket as No. 973.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 574193 560

[fol. 13]

SUPREME COURT OF THE UNITED STATES

No. 115, October Term, 1960

STEPHEN FRANKLIN REYNOLDS, Petitioner,

vs.

H. G. COCHRAN, JR., Director of Division of Corrections, Florida.

On Consideration of the motion to enlarge the record in this case,

ORDER POSTPONING FURTHER CONSIDERATION OF MOTION TO ENLARGE RECORD, ETC.—October 24, 1960

It Is Ordered by this Court that further consideration of the motion to enlarge the record is postponed to the hearing of the case on the merits.

FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 28 1960
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 115

STEPHEN FRANKLIN REYNOLDS,

Petitioner,

vs.

H. G. COCHRAN, JR., Director of Division of Corrections, State of Florida,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER

CLAUDE PEPPER,
1701 Meridian Avenue,
Miami Beach, Florida,
Counsel for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 115

STEPHEN FRANKLIN REYNOLDS,

Petitioner,

vs.

H. G. COCHRAN, JR., Director of Division of Corrections, State of Florida,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER

Opinion Below

The Supreme Court of Florida did not file an Opinion. Its Order denying Petition for Writ of Habeas Corpus (R. 12) has not been officially reported.

Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, U.S. Code, Sec. 1257(3).

The final judgment of the Supreme Court of Florida denying Petitioner's Petition for Habeas Corpus upon the ground that he is imprisoned in violation of his rights under the Fourteenth Amendment to the Constitution of the United States was rendered on September 15, 1959 (R. 12). Petitioner's Motion for Leave to File a Petition for Writ of Habeas Corpus was denied by this Court, but treating the paper submitted by Petitioner as a Petition for Writ of Certiorari, certiorari to the Supreme Court of the State of Florida was granted on May 31, 1960. This Court at the same time granted permission to the Petitioner to proceed in forma pauperis.

Constitutional Provisions and Statutes Involved

The constitutional and statutory provisions involved are set forth in the Appendix hereto, pp. 31-34. These official citations are as follows:

1. Section 1, Fourteenth Amendment, Constitution of the United States, Volume 1, United States Code, 1952 ed., pp. XLV-XLVI.

2. Fifth Amendment, Constitution of the United States, Volume 1, United States Code, 1952 ed., p. XLIV.

3. Section 11, Declaration of Rights, Florida Constitution.

4. Section 4, Article V, Florida Constitution.

5. Section 6, Article V, Florida Constitution.

6. Title 28, Section 1257(3), United States Code.

7. Section 775.09, Chapter 775, Title XLIV, p. 2790, the Official Florida Statutes 1957.

8. Section 775.11, Chapter 775, Title XLIV, p. 2791, the Official Florida Statutes 1957.

9. Section 775.01, Chapter 775, Title XLIV, p. 2790, the Official Florida Statutes 1957.

10. Section 79.10, Chapter 79, Title VI, p. 283, the Official Florida Statutes 1917.

11. Section 79.04, Chapter 79, Title VI, p. 282, the Official Florida Statutes 1957.

12. Section 79.06(1), Chapter 79, Title VI, p. 282, the Official Florida Statutes 1957.

Questions Presented

I.

Where a Petition for Writ of Habeas Corpus to the Supreme Court of Florida contained strong and uncontradicted allegations that Petitioner had been denied an opportunity to be heard through counsel on a Second Offender charge, that he was not informed of his right to a trial as required by statute, that he was prejudged by a prejudiced Court and sentenced under a statute allegedly invalid as applied to him, and where the Supreme Court knew that Petitioner prepared his own Petition without benefit of counsel, was it not a denial of due process under the Fourteenth Amendment to the Constitution of the United States for the Florida Supreme Court to deny such Petition without requiring a response thereto and without an inquiry as to the facts, thus involving a determination of the Federal questions presented therein as to denial of due process and affording this Court jurisdiction to review that decision?

II.

Did the Florida Supreme Court deny due process of law to Petitioner by denying his Petition for Writ of Habeas Corpus without a hearing where such Petition was drawn without aid of counsel and, uncontroverted, alleged:

(1) That his request for a continuance of his hearing on a Second Offender charge in order that counsel might represent him was denied?

(2) That he was not accorded a fair trial nor cautioned as to his rights as required by the Florida Second Offender Statute?

(3) That he was re-sentenced under the Florida Second Offender Statute, whereby having fully served the prior sentence imposed for the same offense, he was put twice in jeopardy and was deprived of his liberty by a Court which no longer had jurisdiction over the subject matter of the crime for which he was re-sentenced?

Statement of the Case

On July 28, 1959, Petitioner filed a Petition for Writ of Habeas Corpus[1] with the Supreme Court of Florida alleging that he was deprived of his liberty in violation of his rights under the Fourteenth Amendment to the Constitution of the United States and particularly the due process clause (R. 1-5) and that Court, without requiring the Respondent to answer and without a hearing on the matter and without making any inquiry as to the facts, issued its Order denying Petition for Writ of Habeas Corpus on September 15, 1959 (R. 12).

---

[1] Petitioner prepared and filed his own Petition without aid of counsel.

Under these circumstances the allegations contained in the Petition must be taken as true for purposes of review by this Court. *Hawk* v. *Olson*, 326 U.S. 271, 273 (1945); *White* v. *Ragen*, 324 U.S. 760, 763 (1945); *Williams* v. *Kaiser*, 323 U.S. 471, 473 (1945). These allegations are as follows:

The Petitioner was informed against as a "Second Offender" on February 13, 1958 (R. 8-10) notwithstanding the fact that he had completed a two-year sentence and had been at liberty for some three months by reason of having discharged such sentence. He was arrested on February 18, 1958 without a warrant in Volusia County, Florida, and the arresting officer, a Deputy Sheriff of that county, did not know the reason for the arrest. Petitioner was taken to Polk County, Florida, and was forced to go before the Court against his will. Petitioner informed the Court that he had legal counsel then on the way, and that counsel was to arrive that morning (February 20, 1958), to represent him on whatever the charge might be and requested a continuance for that purpose, but the Court informed the Petitioner "You do not need counsel in this case," and "No point in calling a doctor to a man already dead" (R. 5). The trial court then read two convictions from the record before it, namely, conviction on the 30th day of May, 1934, of the crime of robbery with a sentence of five years in the State Prison and a conviction on May 10, 1956, of the crime of grand larceny with a sentence of two years. The trial court then asked the accused "You are guilty of these two convictions are you not?" and the accused admitted that he was (R. 5). The Court then found the accused guilty of the offense of "Second Offender" and sentenced him to a term of ten years at hard labor in the Florida State Prison (R. 11).

Petitioner filed a Petition for Writ of Habeas Corpus in the Circuit Court of the Tenth Judicial Circuit which

Petition is not a part of this record, and in compliance with the Order of Honorable Gunter Stephenson, *Circuit Judge,* in and for the Tenth Judicial Circuit of Florida, entered on August 5, 1958, Petitioner was brought before the Criminal Court of Record in and for Polk County, Florida, on August 25, 1958, whereupon Judge Roy H. Amidon entered his "Order Setting Aside Sentence Previously Imposed Herein on February 20, 1958 and Entering New Sentence" (R. 6-7). This Order merely vacated the Order of February 20, 1958, under which Petitioner was sentenced to serve ten years in the State Prison and a new sentence of ten years in the State Prison was imposed allowing credit to the Petitioner for all time served in connection with the sentence imposed by that Court on May 10, 1956 upon conviction of the crime of grand larceny and further giving credit for all time served in connection with the sentence of February 20, 1958, for the "offense of Second Offender."[2]

The record is completely devoid of any showing that, at the hearing upon the Second Offender charge, the Petitioner was informed "of his right to be tried as to the truth thereof" or that he was "duly cautioned as to his right," provided by Section 775.11, F.S. 1957, Appendix, pp. 32-33, which statute regulates the procedure in prosecutions for second and subsequent offenses.

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[2] Thus (not that it matters) as the record now stands, Petitioner was convicted on May 10, 1956 of grand larceny and sentenced to serve two years, which sentence has never been vacated, and he was sentenced on August 25, 1958 to ten years in the State Prison for no crime whatsoever but only pursuant to the Order of Judge Stephenson that a proper sentence be entered (R. 6-7).

Summary of Argument

I.

The Supreme Court of Florida under the Florida Constitution has original jurisdiction to entertain Petitions for Writs of Habeas Corpus and to issue such writs. The Supreme Court of Florida could not have denied Petitioner's petition under a Florida statute forbidding the filing of a Petition for Writ of Habeas Corpus in the Supreme Court when there had been a prior application to a Circuit Court of the State and the Circuit Court had ruled upon the petition because that statute applies only where the facts presented to the Circuit Court and the Supreme Court in the respective petitions were identical. The Supreme Court of Florida did not have before it the Petition for a Writ of Habeas Corpus to the Circuit Court and if it had had such petition before it, the facts in the two petitions were not the same. Additional substantial grounds were alleged in the petition before the Supreme Court. The decision of the Federal questions presented in the Petition was, therefore, essential to the decision of the Florida Supreme Court in denying Petitioner's Petition for Writ of Habeas Corpus.

II.

(A) The Petitioner is deprived of his liberty without having had due process of law in the courts of Florida. Apprehended after being at liberty for three months upon the completion of a prior sentence without being informed of what the charge was against him, upon being brought before the Court he was denied a request for a continuance of his hearing so that he might obtain counsel to defend him upon whatever that charge might be, although he informed the Court that counsel whom he had engaged was en route to the hearing.

(B) He then first learned that he was charged with being a Second Offender. Instead of getting a hearing before a fair and impartial court, he was not only denied counsel but the Court clearly indicated that it had already adjudged him to be guilty before he had had a hearing. The Court failed, as a fair interpretation of the record shows, to follow the mandatory requirement of the Second Offender Statute designed to assure him a fair trial, that the Petitioner be informed that he had a right to be tried as to the truth of the charge against him. The Court itself read what purported to be two records of felony convictions against the Petitioner and then asked him if he were not guilty of these offenses. With counsel denied him, not being informed by the Court that he had a right to a trial as to the charge against him, presumably having no knowledge of what his rights were, and being convinced by the conduct of the Court that the Court had already adjudged him to be guilty, the Petitioner was induced by the Court to plead guilty without any awareness of the significance of his plea. Thus Petitioner was denied the safeguards provided him by the Florida Second Offender Statute as well as the Fourteenth Amendment to the Constitution of the United States.

(C) Regardless of the purpose of the Florida Second Offender Statute, its application to the Petitioner under the facts of this case deprives him of his liberty without due process of law, and places him twice in jeopardy in that, having fully served the first sentence imposed for the same offense, he was re-sentenced by a Court which had lost jurisdiction of the subject matter of this crime. As so applied to the Petitioner, the Statute is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I.

The Florida Supreme Court Ruled Upon and Denied Petitioner's Claims That He Is Imprisoned in Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

A. *The Petition for Writ of Habeas Corpus Properly Raised With the Required Precision Petitioner's Claim That He Is Imprisoned in Violation of His Rights Under the Due Process Clause of the Fourteenth Amendment:*

In *Herndon* v. *Georgia*, 295 U.S. 441, 442-3 (1935), this Court has held that a mere reference to the "Constitution of the United States" may not be sufficient to raise a Federal question in a State Court. In the Petition before this Court, however, Petitioner specifically asserted that at his hearing he was denied the right of a continuance requested in order that he might have the assistance of counsel (R. 4-5) and in his Petition he states clearly and unequivocally that "he is being held, detained and deprived of his personal freedom without due process of law; further, that the trial court violated his constitutional rights and the fundamental fairness that is so essential to the very concept of justice" (R. 1). Petitioner could not have pleaded the violation of the Fourteenth Amendment more clearly had he specifically cited it.

His further pleas that "he is entitled to any and all amendments of the constitution and bill of rights of the United States and the State of Florida" (R. 1), though inartfully expressed, certainly raised in the Florida Supreme Court the Federal question which gives rise to the jurisdiction of this Court, and that question was decided adversely to Petitioner.

B. *Petitioner Properly Invoked the Remedy of Habeas Corpus in the Florida Supreme Court.*

Habeas Corpus is a Writ of right obtainable under the Florida Constitution and the statutes of Florida, by all men who claim to be unlawfully imprisoned against their will and an informal communication sent by a prisoner without means suggesting that he had been deprived of his constitutional right to trial by jury and assistance of counsel will be treated as sufficient application for Writ of Habeas Corpus, though, it did not conform with statutory requirements regarding such applications. *Sneed* v. *Mayo,* Fla. 66 So 2d 865 (1953).

The Florida Constitution vests the State Supreme Court, each of the justices thereof, the various Circuit Courts and the judges thereof, each with concurrent jurisdiction to issue Writs of Habeas Corpus. (Sections 4 and 6, Art. V, Constitution of the State of Florida, Vol. 3, pages 3067-3068, the Official Florida Statutes 1957.) (Appendix, pp. 31-32.) It is clear, therefore, that the Court below had the power to entertain this case.

The Supreme Court of Florida entertains original Habeas Corpus proceedings. *Sneed* v. *Mayo,* Fla. 69 So 2d 653 (1954). We have no such ruling in Florida as was applicable in *Ex parte Hawk,* 321 U.S. 114, 116 (1944), where under Nebraska law the Supreme Court of that state remits the Petitioner to an application to the appropriate state court from whose decision an appeal lies to the State Supreme Court.

In the recent case of *Cash* v. *Culver,* Fla. 122 So 2d 179 (1960), the Florida Supreme Court said:

"When one is convicted of a crime as a result of deprivation of organic due process, the judgment of guilt is

void and may be set aside in a habeas corpus proceeding even after the appeal period has expired."

122 So 2d at p. 187

The *Cash* case involved an original application for a Writ of Habeas Corpus which was first denied without opinion and subsequently was considered on two separate occasions as a result of a mandate by the Supreme Court of the United States. *Cash* v. *Culver,* 358 U.S. 633 (1959); *Cash* v. *Culver,* Fla. 120 So 2d 590 (1960); *Cash* v. *Culver,* Fla. 122 So 2d 179 (1960).

C. *The Petition for Habeas Corpus Was Not Barred by Former Adjudication.*

Section 79.10, F.S. 1957 (Appendix, pp. 33-34) provides that a judgment entered of record in a Habeas Corpus proceeding, shall be conclusive unless reversed upon appeal and that no person remanded by such judgment while the same continues in force shall be at liberty to obtain another habeas corpus for the same cause. Since there was no prior judgment before the Florida Supreme Court, it could not have denied the Petition on the basis of Sec. 79.10, F.S. 1957. Sections 79.04 and 79.06(1), F.S. 1957 (Appendix, p. 34) require a return to a Writ of Habeas Corpus and a hearing upon the issues raised by the return and, a fortiori, a return to the Writ is mandatory if issues are to be raised and a hearing had on those issues. The record is devoid of any showing that Petitioner ever had a hearing in a Circuit Court. Though Petitioner refers to "a Habeas Corpus hearing in 10th Judicial Circuit at Bartow Florida" (R. 3) that "hearing" was a mere re-sentencing (See Order Setting Aside Sentence Previously Imposed Herein on February 20, 1958 and Entering New Sentence (R. 6-7)) pursuant to the Order issued by Circuit Judge Gunter Stephenson of the 10th Judicial Circuit of Florida as a

result of that Court's having considered Petition for Writ of Habeas Corpus without a hearing on the matter and without having required Respondent to answer.

On original habeas corpus proceedings in *Sneed* v. *Mayo*, Fla. 69 So 2d 653 (1954), the Supreme Court of Florida has said:

> " . . . But inasmuch as the purpose of this habeas corpus proceeding is to inquire into the legality of the detention of the prisoner under the judgment and sentence in the cause, the inquiry upon the questions tendered by the petition should be directed to the determination, not of whether the fact of due process does or does not affirmatively appear by the record, but whether *in truth and in fact* due process was actually observed in the course of the trial proceedings."
>
> 69 So 2d at p. 655

According to its own ruling in *Sneed* v. *Mayo, supra*, the Supreme Court of the State of Florida should have made inquiry as to the extent of the "hearing" to which Petitioner inartfully referred in his Petition for Writ of Habeas Corpus to that court. It could not have denied his Petition on the basis of res judicata since the content of his prior Petition to the Circuit Court was not shown in his Petition, nor was the prior Petition part of the meager record before that Court.

The Florida Supreme Court in the recent case of *State* v. *Reynolds*, Fla. 123 So 2d 465 (1960) denied the original Petition for Writ of Habeas Corpus filed by petitioner. In that case, however, the Florida Supreme Court had before it the entire record of the lower courts, which records showed that on a prior Petition for Writ of

Habeas Corpus to the Circuit Court of the 4th Judicial Circuit, the Circuit Judge had heard testimony on the matters raised by the Petition and Return and that after extensive consideration of the matter, the Circuit Judge discharged the writ, dismissed the petition and remanded the petitioner to custody. In addition, oral argument was presented before the Florida Supreme Court by counsel for the petitioner. Therefore, the Florida Supreme Court under the completely different facts in that case was eminently correct in stating:

> "By the original petition now presented to us we are requested to issue the writ on identically the same grounds as those urged upon the Circuit Judge and on the basis of a transcript of the testimony heard by him. We have not been presented with an appeal from the adverse ruling of the Circuit Judge. It is obvious that the petitioner seeks to substitute this proceeding in the place and stead of appeal. We have consistently held that this not be done. Watson v. Stone, 148 Fla. 516, 4 So. 2d 700; State ex rel. Buckner v. Culbreath, 147 Fla. 560, 3 So. 2d 380."
>
> 123 So at p. 466

But in the instant case, there was nothing in the record before the Florida Supreme Court to indicate that the Petitioner had had a hearing on his plea that he had been denied a fair trial and had not been accorded due process of law. Nor did our Petitioner have the benefit of counsel in preparing his Petition nor in arguing his case. The Florida Supreme Court had before it only the Information under which Petitioner had been sentenced as a Second Offender, the Judgment and sentence of the lower court of February 20, 1958, and the Order Setting Aside Sentence Previously Imposed Herein on February 20, 1958 and

Entering a New Sentence August 25, 1958, plus the Petition for Writ of Habeas Corpus. This comprised the meager record before that Court.

In *Washington* v. *Mayo*, Fla. 91 So 2d 621 (1956), the Supreme Court of Florida in effect held that it is essential that an accused be duly cautioned as to his rights in an habitual criminal hearing and that Petitioner had a further right to a hearing on that issue:

> "The petition raises an additional point to the effect that preliminary to a conviction under the habitual criminal statute it is required that the accused be 'duly cautioned as to his rights'. Section 775.11, Florida Statutes, F.S.A. The petition asserts that petitioner was not so informed. The record of the trial submitted to us contains no light on the subject. The respondent asserts that petitioner was informed of his rights. A factual issue is therefore created.
>
> "This Court will not undertake to resolve such factual issues. 31 F.S.A. Supreme Court Rule 20(3). The judgment hereafter announced, therefore, is without prejudice to the rights of petitioner to present the issue by appropriate proceedings in a proper trial jurisdiction."
>
> 91 So 2d at p. 623

Since the Petition for Writ of Habeas Corpus was not barred by a former adjudication, Petitioner herein was denied due process of law by the Florida Supreme Court by its denial of his petition and having exhausted his state remedies it is to this Court that Petitioner turns for justice.

II.

Petitioner Was Denied Due Process of Law by the Florida Supreme Court's Denial of His Petition for Writ of Habeas Corpus.

A. *Petitioner Was Denied Due Process of Law by the Florida Supreme Court's Denial of His Petition for Writ of Habeas Corpus Which Alleged the Trial Court's Refusal to Grant Him a Continuance in Order That He Might Have Counsel Present to Represent Him.*

This Court has held that the denial of an opportunity to obtain counsel in a trial under an Habitual Offender Act is a clear violation of the due process clause of the Fourteenth Amendment. *Chandler* v. *Fretag,* 348 U.S. 3 (1954). In that case the evidence showed that Petitioner had not been informed that he had been charged under the Tennessee Habitual Criminal Act until the day of the trial of the felony which was a fourth offense, whereupon Petitioner requested a continuance to enable him to obtain counsel, but this request was refused and he was given a life sentence. Upon Petition for Writ of Habeas Corpus to the Circuit Court of Knox County, a full hearing was had upon Petitioner's allegation that he had been denied an opportunity to obtain counsel in his defense. Nevertheless the Circuit Court upheld the validity of Petitioner's sentence and the Tennessee Supreme Court affirmed. This Court on Writ of Certiorari to the Supreme Court of Tennessee reversed that court's judgment of affirmation stating that even though petitioner may have waived his right to counsel on the housebreaking and larceny charge it did not follow that he had waived his right to counsel on the Habitual Criminal charge.

In its opinion in *Chandler* v. *Fretag, supra,* this Court reiterated the language it had used in *Powell* v. *Alabama,* 287 U.S. 45 (1932):

> "If in any case, civil or criminal, a State or Federal Court were arbitrarily to refuse to hear a Petitioner by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense . . . By denying petitioner any opportunity whatever to obtain counsel on the habitual criminal accusation, the trial court deprived him of due process of law as guaranteed by the Fourteenth Amendment."
>
> 348 U.S. at p. 10

It has been held by this Court that the right to counsel is a right protected by the Fourteenth Amendment of the Federal Constitution even where the action of the State Court in denying Petition for Writ of Habeas Corpus was on the ground that the State Statute requiring appointment of counsel was not valid. *Williams* v. *Kaiser,* 323 U.S. 471 (1945). This Court held that a conviction on a plea of guilty after refusal of a proper request for counsel because of the accused's incapacity adequately to defend himself will not support imprisonment, and that such procedure violates the Fourteenth Amendment to the Constitution. *Tomkins* v. *Missouri,* 323 U.S. 485 (1945). In both of the above cases the denied request was for court appointed counsel.

Where Petitioner requested a continuance of twenty-four hours for the purpose of consulting counsel, examining the charge, subpoenaing witnesses and preparing a defense, which request was denied, this Court has held that such denial violates the Fourteenth Amendment. *Hawk* v. *Olson,*

326 U.S. 271 (1945). This Court has even felt it necessary to consider at great length the question of whether due process required the State to tender assistance of counsel to defendants who plead guilty to non-capital offenses (*Bute* v. *Illinois*, 333 U.S. 640 (1948)) and to a person charged under an Habitual Criminal Statute with being a fourth offender (*Gryger* v. *Burke*, 334 U.S. 728 (1948)).

Section 11 of the Declaration of Rights, Constitution of the State of Florida (Appendix, p. 31) provides that in criminal prosecutions "The accused . . . shall be heard by himself, or counsel or both. . . ." The Florida Supreme Court held in *Cash* v. *Culver*, Fla. 122 So 2d 179 (1960) that the accused had been denied due process under both the Federal and Florida Constitutions where his defense attorney had withdrawn five days before the trial and the trial court had refused to grant a continuance to afford accused a reasonable opportunity to obtain counsel. The Florida Supreme Court said:

> "There are now many decisions which firmly establish that a fair and reasonable chance to obtain counsel in a criminal case is absolutely essential to due process and therefore vital to the validity of an ultimate judgment of guilt. Chandler v. Fretag, supra (348 U.S. 3), is the leading decision on this particular point..."
>
> 122 So 2d at p. 187

On the Florida Supreme Court's first consideration of the *Cash* case on application for Writ of Habeas Corpus, it denied the writ without opinion as in the case now before this Court. However, in *Cash* v. *Culver*, 358 U.S. 633 (1959) this Court said:

> "... the requirements of due process made necessary the assistance of a lawyer if the circumstances alleged in the Habeas Corpus Petition are true ..."
>
> 358 U.S. at p. 638

In compliance with the mandate of this Court, the Florida Supreme Court issued the Writ, requiring a Return and appointed a commissioner to receive evidence on the question of the denial of the right to obtain counsel resulting from the denial of the Motion for Continuance. *Cash* v. *Culver*, Fla. 120 So 2d 590 (1960). Upon rehearing of the matter, with the trial record supplemented by the evidence offered at the Commissioner's Hearing the Florida Supreme Court concluded that Cash was denied a reasonable opportunity to obtain a lawyer to defend him and was therefore deprived of his constitutional right to be heard through counsel. *Cash* v. *Culver*, Fla. 122 So 2d 179 (1960). The constitutional right afforded under the Fourteenth Amendment to be heard by counsel was clearly delineated by the Florida Supreme Court:

> "We have reviewed our own precedents to demonstrate that they clearly support the decisions of the Federal Courts regarding the essentiality of an opportunity to obtain counsel of one's own choice as an aspect of due process under the Fourteenth Amendment to the Constitution of the United States."
>
> *Cash* v. *Culver*, 122 So 2d at p. 186

The only similarities between the *Cash* case and the instant one is that both defendants asked for a continuance for the purpose of obtaining counsel, both were refused by the trial court, and in both cases the Supreme Court of Florida denied the Petition for Writ of Habeas Corpus. The notable differences in the two cases are that Cash had had a distinguished criminal lawyer on his first trial which resulted in a mistrial; he was still represented by counsel until three days before his second trial when

counsel withdrew; moreover, he was able to and did conduct his own defense in the second trial with professional finesse. And finally, he was accorded, aside from lack of counsel, a fair trial. Whereas in the case of Petitioner he had never had the advice of counsel, he didn't know the charge against him until he was before the court, he was induced into pleading guilty without being cautioned of his right to a trial, he was ignorant of the seriousness of the charge, and he had not the skill required to defend himself.

Under the appalling set of facts shown in the record before this Court, therefore, there can be no doubt that the Petitioner requested and was denied the right to assistance of counsel guaranteed him under the Fourteenth Amendment to the Constitution of the United States.

B. *Petitioner Was Denied Due Process of Law by the Trial Court's Failure to Caution Him as to His Rights as Required by the Florida Second Offender Statute, by the Court's Failure to Observe All the Mandatory Requirements of That Statute and by the Court's Failure to Accord Him a Fair Trial.*

Section 775.11, F.S. 1957 (Appendix, pp. 32-33) provides:

> "... whereupon the Court in which such conviction was had shall cause said person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegations contained in such information and of his right to be tried as to the truth thereof, according to law ..."

The record is silent insofar as any averment that the Defendant was apprised of his right to be tried as to the truth of the allegations contained in the Information. In

fact the Petition clearly indicates that he was not so informed (R. 4-5). The procedure prescribed by an Habitual Offender Statute must be strictly pursued and the record of the Court should show at least in essentials that it has been pursued. *People* v. *Brown*, 253 Mich. 537, 235 N.W. 245 (1931). *Sneed* v. *Mayo*, Fla. 69 So 2d 653 (1954), *People* v. *Gowasky*, 244 N.Y. 451, 155 N.E. 737 (1927). Otherwise, those fundamental rights guaranteed under the Fourteenth Amendment to the United States Constitution are disregarded and the offender is convicted without due process of law.

Sec. 775.11, F.S. '57 (Appendix, pp. 32-33), governing the procedure in prosecutions for second and subsequent offenses, provides:

> "... If the jury finds that he is the same person or if he acknowledges or confesses in Open Court *after being duly cautioned as to his rights* that he is the same person the Court shall sentence him to the punishment prescribed in Sec. 775.09 and Sec. 775.10 as the case may be, ..." (italics supplied).

In the record before this Court there is absolutely nothing to show that this Petitioner was cautioned as to his rights. Moreover, Petitioner alleges "that he was forced to go before the Court against his will; that once before the Court your Petitioner informed the Court that he then had legal counsel on the way to represent him in whatever charge may be; ... that after being so informed the trial court so stated to your Petitioner 'You do not need counsel in this case' . . . 'no point in calling a doctor to a man already dead'" (R. 4-5). It is clear that rather than cautioning the Defendant as to his rights, the record shows that the Court denied him his asserted rights. The Court's summary procedure in securing an admission from

the Defendant that he was guilty of the two convictions charged in the Information, as alleged by Petitioner (R. 5) refutes any possible assumption that the Court dealt fairly with the Defendant before it or that the Court had in mind or observed the statutory requirement that the accused be cautioned as to his rights or that it heard the defendant before it judged him.

In *People* v. *Gowasky*, 244 N.Y. 451, 155 N.E. 737 (1927) the defendant appealed from a conviction under the New York Habitual Offender Act which is almost identical to that of the State of Florida. That Court pointed out the absolute necessity of following the law in all its terms and provisions but ruled in the *Gowasky* case that the requirement that the Court inform the defendant of his right to be tried by a jury as to the truth of the charge was waived by defendant's counsel who pleaded guilty for the prisoner to the charges contained in the Information. In the case this Court is now considering there was no counsel, there was no waiver, there was no due process.

This Court stated in *Williams* v. *Kaiser*, 323 U.S. 471 (1945):

> "The petition for habeas corpus was denied without requiring the state to answer or without giving petitioner an opportunity to prove his allegations. And the allegations contained in the petition are not inconsistent with the recitals of the certified copy of the sentence and judgment which accompanied the petition and under which petitioner is confined. Hence we must assume that the allegations of the petition are true. *Smith* v. *O'Grady*, supra (312 U.S. 329). Read in that light we think the petition makes a prima facie showing of denial of the constitutional right."
>
> 323 U.S. at pp. 473 and 474

The above statement of this Court applies squarely to Petitioner's case and we must assume that the allegations are true.

C. *Petitioner Was Denied Due Process of Law by the Florida Supreme Court's Denial of His Petition for Writ of Habeas Corpus Since, Having Fully Served the Prior Sentence Imposed for the Same Offense He Was Put Twice in Jeopardy and Was Deprived of His Liberty by a Court Which No Longer Had Jurisdiction Over the Subject Matter of the Crime for Which He Was Re-sentenced.*

Although this Court has upheld habitual offender statutes (*Graham* v. *West Virginia*, 224 U.S. 616 (1912), *Moore* v. *Missouri*, 159 U.S. 673 (1895, *McDonald* v. *Mass.*, 180 U.S. 311 (1901), *Gryger* v. *Burke*, 334 U.S. 728 (1948)), no case has been found where this Court has expressed an opinion as to whether due process of law was denied to one convicted under such a statute where, as in the instant situation, the accused was at liberty after having fully served his prior sentence for the same offense, his new sentence being necessarily imposed by a court which had lost jurisdiction over the subject matter of his offense.

While certain state decisions have upheld the legality of a statute similar to that of Florida, these cases have not upheld the validity of a sentence imposed under such a statute under similar circumstances as are presented in this case. Although there was dicta in *State* v. *Sudekatus*, 72 Ohio App. 165, 51 N.E. 2d 22 (1943) which purported to show that the Habitual Criminal Act of Ohio contemplated a case such as the instant one, the court's ultimate finding was, however, that the defendant must be discharged as he had not been convicted of larceny on his fourth offense and that his prior convictions having been before the enactment of the Ohio Habitual Criminal Act,

there was no basis for a charge under that act. *In re Sims*, Ohio App. 98 N.E. 2d 76, 104 N.E. 2d 193 (1950) involved an appeal from judgment under the Habitual Criminal Act. The Ohio Appellate Court, however, merely held that Defendant's appeal from his last sentence (under the Habitual Criminal Act) was erroneous and that appeal should have been made from the prior sentence.

Since the Louisiana Habitual Criminal Act is similar to that of Florida, *State* v. *George*, 218 La. 18, 48 So 2d 265 (1950) has been regarded as settling the validity of a sentence imposed under such Acts, where the defendant had already served his prior sentence before being charged under the Act. Defendant's Petition for Writ of Certiorari to this Court was denied without opinion. *George* v. *State of Louisiana*, 340 U.S. 949 (1951).

The factual difference between the *George* case and the one before this Court is noteworthy, however, since George was a six time offender, the intervals between his offenses being so brief that there is no doubt but that he was a hardened criminal of the type for which this statute was intended. Moreover, the Louisiana statute provides that it shall not be applicable in cases where more than five years have elapsed between the expiration of the maximum sentence of the previous conviction and the time of the commission of the last felony for which the accused has been convicted. Petitioner, it will be remembered, committed his first crime in 1934 and it was 22 years before he committed the second crime for which he was sentenced twice, the second time being under the Florida Second Offender Act. The word "habitual" hardly described Petitioner in the instant case.

The Second Offender Statute of Florida is almost identical to that of the State of New York. Conviction under the New York Statute was upheld in *People ex rel.*

Fernandez v. *Kaiser,* 230 App. Div. 646, 246 NYS 309 (1930); Aff. 256 N.Y. 581; 177 N.E. 149 (1931). At his trial on a fourth offense the Court revoked the prior sentence which had been fully served and sentenced the accused to fifteen years, the Appellate Division holding that this did not constitute double jeopardy. The Court considered and affirmed the applicability of the Habitual Criminal Act to the defendant, but the factual situation shows that this defendant was already before the Court on trial for two new offenses when the Habitual Criminal charge was made. It is to be noted that the Court did not inquire into the question of whether the Legislature *had given the proper authority to the Courts* to correct a sentence where the accused had already suffered his full punishment for the offense. Certiorari was denied by this Court in *Fernandez* v. *Kaiser,* 284 U.S. 631 (1931), again without opinion.

The Florida Supreme Court has not decided the precise question of whether under its Second Offender Act a person who has fully served the sentence imposed for his last crime may then be re-sentenced in accordance with the Second Offender Statute. In *State* v. *Nelson,* 36 So 2d 427 (1948), the Defendant was convicted and sentenced for a felony in 1937; on October 30, 1939, he was convicted and sentenced to five years imprisonment for another felony; on November 2, 1939 he was sentenced to life imprisonment as a Fourth Offender. On July 14, 1947 his sentence of life imprisonment was voided in habeas corpus proceedings in the jurisdiction of his confinement. On August 27, 1947, after he had served all *lawful* sentences imposed against him, proceedings were had under the Second Offender Statute and he was sentenced as a Second Offender. On December 4, 1947 the Judge of the Criminal Court of Record quashed the Second Offender Information and the

State appealed. The Florida Supreme Court considered the common law which is in force in Florida. Sec. 775.01 F.S. '57 (Appendix, p. 33). The Court reiterated the well established rule that a trial court is without power to set aside sentence after the Defendant has been committed thereunder, and impose a new or different sentence increasing the punishment, even at the same term at which the original sentence was imposed and that a judgment which attempts to do so is void and the original judgment remains in force. The Florida Supreme Court then said:

> "Doubtless the purpose of the use of the language 'at any time' etc., was to overcome the limitations of the general law on the court as to term time and the limitation imposed in the event that execution of the sentence has commenced and the trial court had otherwise lost jurisdiction."
>
> 36 So 2d at p. 429

The Court concluded:

> "Whether or not in this jurisdiction there is any limitation of time on the Court's power to impose a sentence as provided by Section 775.09, supra, it is our conclusion that under the facts and circumstances it has not expired in *this* instance." (Italics supplied.)
>
> 36 So 2d at p. 429

It is to be seen, therefore, that in this case the Florida Supreme Court left open the question of the power of a trial court to impose a greater sentence on a person who had fully served the prior sentence given for the same offense.

The Florida Supreme Court again considered a similar case in *Milan* v. *State of Florida*, 102 So 2d 595 (1958). In

that case only two questions were before the Florida Supreme Court, namely:

(1) Did the Court err in denying Defendant's Motion to Quash the Amended Information charging him with being a Second Offender and in sentencing him after he had served the sentence for the second offense?

and

(2) Was the State barred by Chapter 932.05, Florida Statutes 1955 F.S.A. from prosecuting and sentencing him under the Second Offender Statutes, more than two years after the last conviction of felony?

As to the second question the Florida Supreme Court held that the general Statute of Limitations barring prosecution for an offense two years after its commission, has no application to charges under Florida Second Offender Statutes. As to the first of these questions, the Court said:

> "The first of the above questions as posed is not before the Court because there is no showing that appellant had actually served his entire sentence for the second offense before the amended information was filed charging him with being a second offender. On this question there is a difference of opinion among the members of the Court, but as it is not ripe for determination under the record here, no useful purpose could be served by discussing it."
>
> 102 So 2d 596

Thus it is clear that the Florida Supreme Court has not as yet decided what effect the Second Offender Statute of Florida has with regard to a trial court's power to impose a greater sentence upon one who has fully served the sentence previously imposed for the same crime.

The factual situation before this Court deserves careful consideration. Petitioner committed a crime in 1934, was convicted, sentenced, and paid his debt to society. Twenty-two years later he committed a second offense for which he was convicted and sentenced to two years imprisonment. Judging by the short term of imprisonment meted out to the Petitioner there were obviously some mitigating circumstances considered by the trial court. Petitioner fully served his term and, with gain time, was discharged in December of 1957. He now was attempting to rehabilitate himself and to become a worthy member of society. Having done no wrong, he was suddenly arrested and without being told the reason therefor, was dragged across five county lines and taken before the Court. He immediately informed the Court that an attorney was on the way to represent him in whatever charge had been filed against him, that the attorney was to arrive that morning, and requested a continuance so that he might have the benefit of counsel. This the Court summarily refused, telling him he didn't need counsel and that an attorney would be of no help to him. Through a leading question, the Court induced him to admit that he had been convicted of the offenses charged in the Information. Thereupon the Court found him "guilty of the offense of Second Offender" and sentenced him to ten years imprisonment. He was not only denied counsel, but he had no prior notice of the charge against him, he was not cautioned as to his rights, as required by statute, he was led to believe that counsel would be of no avail and induced to admit the convictions charged in the Information, and was apparently prejudged by a prejudiced court. It is obvious the Petitioner did not waive his right to a jury trial by his plea of guilty since he did not understand the significance of the charge against him and his plea of guilty was not intelligently made. Nor, for the same reasons did he waive benefit of counsel

by his plea of guilty after denial of his request for a continuance. *House* v. *Mayo*, 324 U.S. 42 (1945).

All litigation must come to an end. Under the appalling facts outlined above, when the Petitioner had completed his sentence and the trial court no longer had jurisdiction of the subject matter of his former crime, the State's action in arresting him on a charge that does not constitute an offense and re-sentencing him under the Second Offender Statute was in essence a new proceeding which placed him twice in jeopardy for the same offense and deprived him of his liberty without due process of law.

Petitioner's name is and has always remained Stephen Franklin Reynolds. In the absence of a showing that he concealed his identity, the action of the State in waiting almost two years to charge him under the Second Offender Statute amounts in substance to laches and inequity to the Petitioner, the State should have been barred from prosecuting its Second Offender charge.

Thus it is submitted that under the facts of this case, it is repugnant to that standard of due process which this Court has so nobly preserved to allow a trial court which has lost its jurisdictional power with regard to an offense to impose a more severe sentence upon one who has fully served the sentence previously imposed by that court for the same offense. Petitioner respectfully urges, therefore, that Sections 775.09 and 775.11 F.S. '57 as applied to him, are repugnant to the Fourteenth Amendment to the Constitution of the United States in that he is deprived of his liberty by the sentence of a court having no jurisdiction, and therefore without due process of law.

Conclusion

Petitioner herein has been denied every safeguard granted to him by the Constitution of the United States as well as by the Florida Constitution and Statutes. The summary proceedings which have deprived him of his liberty are aptly described by those immortal words "Shocking to the conscience." His plea for counsel, for a fair trial, and for justice has been denied by the State of Florida. It is to this Court that he now turns, as a last resort, seeking that fundamental justice guaranteed to him as a citizen of the United States.

Respectfully submitted,

CLAUDE PEPPER,
1701 Meridian Avenue,
Miami Beach, Florida,
Counsel for Petitioner.

APPENDIX

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, §1

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

United States Constitution, Amendment V

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

Constitution of the State of Florida, Declaration of Rights, Section 11 (*Vol. 3, Florida Statutes*, 1957, p. 3058, Section 11)

Section 11. Rights of accused; speedy trial; etc.—In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him.

Constitution of the State of Florida, Article V, Section 4 (*Vol. 3, Florida Statutes* 1957, p. 3067, Section 4)

"The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

"The supreme court or any justice thereof may issue writs of habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge."

Constitution of the State of Florida, Article V, Section 6 (Vol. 3, Florida Statutes, 1957, p. 3068, Section 6(3))

JURISDICTION. ". . . The circuit courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction."

Florida Statutes in Effect in 1957

Sec. 775.09 (2 Fla. Stat. 1957, p. 2790, Sec. 775.09)

Punishment For Second Conviction of Felony.—A person who, after having been convicted within this state of a felony or an attempt to commit a felony, or under the laws of any other state, government or country, of a crime which, if committed within this state would be a felony, commits any felony within this state is punishable upon conviction of such second offense as follows: If the subsequent felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then such person must be sentenced to imprisonment for a term no less than the longest term nor more than twice the longest term prescribed upon a first conviction. If the subsequent felony is such that upon a first conviction the offender would be punishable by imprisonment for life or for a term of years, in the alternative, then such person must be sentenced to imprisonment for life or for any number of years not less than twenty years.

Sec. 775.11 (2 Fla. Stat. 1957, p. 2791, Sec. 775.11)

Procedure in Prosecutions For Second And Subsequent Offenses.—If at any time after sentence or conviction it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth either in §775.09 or §775.10 the prosecuting attorney of the county in which such conviction was had, shall file an information accusing said person of such previous convictions, whereupon the court in

which such conviction was had shall cause said person, whether confined in prison or otherwise, to be brought before it and shall inform him of the allegations contained in such information and of his right to be tried as to the truth thereof, according to law, and shall require such offender to say whether he is the same person as charged in such information or not.

If he says he is not the same person or refuses to answer or remains silent, his plea, or the fact of his silence, shall be entered of record and a jury shall be empaneled to inquire whether the offender is the same person mentioned in the several records as set forth in such information. If the jury finds that he is the same person or if he acknowledges or confesses in open court after being duly cautioned as to his rights that he is the same person the court shall sentence him to the punishment prescribed in §775.09 or §775.10 as the case may be, and shall vacate the previous sentence, deducting from the new sentence all time actually served on the sentence so vacated.

Whenever it shall become know to any warden or prison, probation, parole or police officer or other peace officer, that any person charged with or convicted of a felony has been previously convicted within the meaning of §775.09 or §775.10 he shall forthwith report the facts to the prosecuting attorney of the county.

Sec. 775.01 (2 Fla. Stat. 1957, p. 2790, Sec. 775.01)

Common Law of England.—The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.

Sec. 79.10 (1 Fla. Stat. 1957, p. 283, Sec. 79.10)

Effect of Judgment.—The judgment so entered of record shall be conclusive until reversed in the manner hereinafter provided for, and no person remanded by such judgment while the same continues in force shall

be at liberty to obtain another habeas corpus for the same cause, or by any other proceeding to bring the same matter again in question except by a writ of error or by action of false imprisonment; nor shall any person who shall be discharged from confinement by such judgment be afterward confined or imprisoned for the same cause, unless by order or judgment of a court of competent jurisdiction.

Sec. 79.04 (1 Fla. Stat. 1957, p. 282, Sec. 79.04)

The Return to The Writ.—The person on whom the writ shall be executed, shall, without delay, bring the body of the prisoner, or cause it to be brought, before the court, justice or judge before whom the writ is made returnable, and at the same time to certify to the cause of the detention.

Sec. 79.06(1) (1 Fla. Stat. 1957, p. 282, Sec. 79.06(1))

Effect of the return.—

(1) GENERALLY.—The return made to the writ may be amended, and shall not be taken to be conclusive as to the facts stated therein, but it shall be competent for the court, justice or judge before whom such return is made to examine into the cause of the imprisonment or detention, to receive evidence in contradiction of the return, and to determine the same as the very truth of the case shall require.

FILE COPY

PETITION NOT PRINTED

Office-Supreme Court, U.S.
FILED
FEB 14 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 115

STEPHEN FRANKLIN REYNOLDS,

Petitioner,

vs.

H. G. COCHRAN, JR., Director of Division of Corrections, State of Florida.

Respondent.

BRIEF OF THE RESPONDENT

H. G. COCHRAN, JR., Director,
Division of Corrections, State
of Florida
Respondent

RICHARD W. ERVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General
Counsel for the Respondent

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BRIEF OF THE RESPONDENT

STATEMENT OF THE CASE

Apart from the arguments which petitioner advances in this portion of his brief to say naught of the case authorities cited and legal conclusions drawn therefrom, in support of his allegations, respondent accepts only so much of petitioner's statement of the case as reflects a true and correct resume of the various steps taken below.

ARGUMENT

In partial response to petitioner's argument under point one, it would be folly to suggest that respondent takes any issue with the question of whether petitioner had satisfactorily raised a Federal question in his proceedings before the Florida Supreme Court for indeed this response is at least a tacit admission that such a requirement has been met.

It would be likewise foolish for respondent to contend that petitioner was not entitled to seek relief via the media of habeas corpus before the Florida Supreme Court.

Similarly, it is not contended that petitioner's petition for Writ of Habeas Corpus to the Supreme Court of Florida was barred by a former adjudication thereof in any other court qualified to pass thereon.

Having made the former concessions, it remains only to be determined whether in fact the Florida Supreme Court effected a denial to petitioner of due process when it denied his petition for writ of habeas corpus on the basis of the contents set out therein. In the last analysis, if the contentions set out in petitioner's pleadings before the Florida Supreme Court did not even make out a prima facie case such as would justify either a response, a return or a hearing on those matters, the Florida Supreme Court was correct in ruling as it did.

So much of petitioner's argumen[t] under point two, as directs itself to the alarming theor[y] [t]hat he could not be

proceeded against as a multiple offender simply because his second felony sentence had been completely served before any such proceedings were taken against him, must be summarily rejected for a lack of any merit whatever.

The general statute of limitations as to the prosecution of non-capital criminal offenses, Section 932.05, Florida Statutes, has no application to habitual criminal prosecutions under Section 775.09, Florida Statutes, (*Milan v. State*, Fla., 102 So. 2d 595, 596) and there is no statute which places any limit of any kind upon prosecutions under Section 775.09, supra. The matter is governed exclusively by the following provisions of Section 775.11, Florida Statutes, (which have been in effect literally unchanged ever since they were first enacted in 1927 as a portion of Section 3 of Chapter 12022):

> "775.11 Procedure in prosecutions for second and subsequent offenses. -- If *AT ANY TIME after sentence or conviction* it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth either in §775.09 or §775.10 the prosecuting attorney of the county in which such conviction was had, shall file an information accusing said person of such previous convictions, whereupon the court in which such conviction was had shall cause said person, *WHETHER CONFINED IN PRISON OR OTHERWISE*, to be brought before it * * *." (Emphasis Supplied)

It seems almost unnecessary to declare that these statutory provisions mean precisely what they say; that is, that *AT ANY TIME* after sentence or conviction, a de-

fendant can be informed against and tried as a second offender when it appears that he has previously been convicted of two felonies as set forth in Section 775.09, supra. Said another way, said statutory provisions permit the prosecution of a defendant as a second felony offender even though he has completely served the sentence originally imposed against him as a result of his second felony conviction.

Such a proposition is firmly entrenched in the decisions of all of the appellate courts of this Country which have construed similar statutory provisions. [*People ex rel. Fernandez v. Kaiser* (N.Y.), 246 N.Y.S. 309, affirmed 177 N.E. 149, certiorari denied 284 U.S. 631; *State v. Sudekatus* (Ohio), 51 N.E. 2d; *In re Sims* (Ohio), 104 N.E. 2d 193; *State v. George* (La.), 48 So. 2d 265; and *Little v. Gladden* (Ore.), 273 P. 2d 443].

There is a case which held that a habitual criminal sentence could not be imposed after the sentence originally imposed had been fully served, that being the case of *Ex parte Broom* (Ore.), 255 P. 2d 1081. However, that very doctrine in the Broom case was repudiated by the same Oregon court in the later case of *Little v. Gladden,* supra, which latter case is squarely in line with the decisions of the other appellate courts throughout the Nation referred to above.

The undeniable result is simply that Florida has a statute of limitations applicable to the prosecution of non-capital offenses but places no limit upon the time within which an information can be filed against a defendant for the purpose of subjecting him to an enhanced

penalty as a second offender. This classification indeed does not deny the second offender the equal protection of the law. There is a sound basis to the classification. The Legislature could reasonably have determined that it is far more important that a second felony offender be informed against as such and thereby receive the enhanced punishment provided by Section 775.09, supra, than for an ordinary offender to be informed against and punished for his crime proper. The Legislature surely could have considered that to inform against and impose an enhanced penalty against a second offender would have a far greater deterrent effect upon like-minded evil doers than to inform against and punish other offenders. Such considerations could reasonably have formed a valid basis for placing no limit upon the time within which the filing of the second offender information could be made while at the same time specifically limiting the time for filing ordinary non-capital criminal informations.

If, in any case, it might conceivably be considered that a second offender information was filed against the defendant so long after he had completely served the sentence originally imposed for the second offense as to shock the conscience of this Court and mankind in general, and thereby amount to a denial of due process of law, it is respectfully submitted that no such situation is presented here. The second offender information in the instant proceedings shows that petitioner's second conviction was for grand larceny and that a two-year sentence was imposed therefor on May 10, 1956. With the aid of gain time earned by him, he completed the service of said sentence on December 1, 1957. The reverse of the

second offender information shows that it was filed less than three months thereafter, viz. on February 15, 1958. Such a short delay cannot be considered to have subjected the petitioner to a fundamental unfairness amounting to a denial of due process of law.

Perhaps a hypothetical would best illustrate the logical reasoning which gave rise to the conclusion advanced by respondent under this division:

> "A" had been lawfully charged with, convicted of and sentenced for a felony in the State of Florida in 1930. After "A" had completely served said sentence, a period of seven years transpires after which he is again lawfully charged with, convicted of and sentenced for a felony violation of the laws of the State of Florida. However, the court, exercising its discretion in selecting the alternative punishment provided, chose instead to impose against "A" only the fine provision of the penalty. This, "A" promptly pays.

He goes on about his merry way and the State of Florida (if we adopt petitioner's rationale) is thereafter precluded from proceeding against him as a second felony violator simply because it did not initiate the proceedings before he paid the fine.

To the possible assertion that this may constitute a ridiculous illustration, your respondent may only conclude that if the logical force with which petitioner presents his

reasoning does in fact exist, it should exist within any and all limits to which the facts of a given situation could be stretched.

It is respectfully submitted that, faced with the above hypothetical which could well and does often occur in a number of instances, the legislation against habitual offenders would be effectively emasculated by the simple expedient of a given violator complying with the punishment order of the court and thereby defeating the very purposes for which the legislation was enacted.

Another illustration of the ridiculous possibilities such an interpretation would necessarily produce is as follows:

> "A" is lawfully sentenced to serve two years for a felony violation (it happens to be his second). "B" is lawfully sentenced to serve thirty years for a felony violation (it happens to be his second).

As to "A", the State of Florida has but two years within which to proceed against him as a second felony violator. Yet as to "B", the State of Florida has thirty years within which to do the same. Such a sliding scale of limitations might well be condemned as a denial of equal protection. Nevertheless, petitioner's position is the very seed from which such an anomalous result might grow.

In fine, you respondent respectfully suggests that the case of *George v. Louisiana*, 340 U.S. 949, is the only polar star to which this Court need turn for an answer to the situation. While it may well be true that this Court's disposition of those proceedings (denial of the petition for certiorari without opinion), may make no conclusion

as to the merits thereunder, one can only conclude that if it was fraught with denials of due process as are urged in the instant proceedings, it is difficult to imagine that such a blatant disregard for the human rights involved would have produced no greater reaction in this Court than that necessary to enter a simple order of denial not even meriting an opinion.

The allegedly salient differences which petitioner points to between the *George* case, supra, and the instant proceedings are of no consequence. The main and only thrust in the *George* case, supra, was the complaint that the imposition of a habitual offender sentence after the last felony conviction had been served constituted the basis for the claim that due process was denied.

The alleged failure to caution petitioner as to his rights must, in order to justify redress by this Court, have worked such an untoward hardship on him as resulted in a conviction where otherwise one could not have been obtained under any circumstances.

Just what is contemplated by the provisions in Section 775.11, supra, requiring the court to advise one charged thereunder as to his rights is somewhat difficult to ascertain for it has never been quite set down. Might it not be suggested logically that it of course contemplates that the man would be advised (1) that he could have a jury trial (2) that he is not required to incriminate himself (3) that he had the right to counsel, and (4) that he be advised of the nature of the charges against him?

Continuing the assumption that the above-mentioned four rights as such, are embraced within the due process clause of the Federal Constitution, we progress to a determination of whether or not these matters were known graphically to the petitioner even if he had not received an affirmative notice thereof from the court in question.

1. By what logical thought processes could it be said that petitioner was not aware that he was allowed to have a jury trial? Here was a man who had committed a felony in 1934—had been punished therefor and a number of years later committed yet another felony and been punished therefor. During the course of those two proceedings one could almost necessarily conclude that he would have to be acquainted with the procedures involved, particularly with relation to the fact that he was entitled to be tried by a jury as an alternative to pleading guilty if he so chose.

2. Just as surely, because of the aforesaid, could one not also conclude that he was thoroughly acquainted with and possessed of the certain knowledge that he need not incriminate himself with testimony from his own lips?

3. The particular element relating to the right to counsel is certainly the least subject to criticism. This is patently so for in truth and fact if the petitioner's allegations be taken as true (which this response by no means does), then obviously he was aware that he had a right to counsel for, as he contends, he had secured the services of counsel and, if we indulge him further, said counsel was physically on his way to the court at the

time the proceedings herein challenged were being conducted. To this end, his own pleadings reduce his claims to the level of a nullity.

4. The fourth and final segment within the rights perhaps contemplated by Section 775.11, supra, broaches an area which the petitioner's own pleadings and exhibits clearly show to be non-existent, that is to say that at the time he was taken before the trial court he was certainly advised of the charges pending against him when the information was read to him.

Thus, it is that petitioner's claim that the court did not caution him as to his rights becomes nothing more than a conclusion founded on conjecture and based on surmise.

So much of the petitioner's argument as directs itself to an alleged claim that due process was denied him by the trial court's alleged refusal to grant him an extension of time within which to allow his counsel to appear in order that he represent him is, not only vigorously denied in every respect, but even if admitted, presents no bar to a conclusion that the proceedings were valid in every cognizable degree.

Your respondent respectfully contends that the allegations contained in the petitioner's petition do not show or allege that the trial court deprived petitioner of due process when it allegedly refused to await the arrival of defendant's counsel and proceeded in his absence without appointing substitute counsel.

For all that was shown by the petitioner to the Supreme Court of Florida, petitioner's attorney was absent from court without any excuse or justification at a time when he should have been present. Certainly it was not the court's responsibility to see that he was present but, quite the contrary, it was the petitioner's and his only. Thrust upon him was the burden of seeing that his attorney was present in court at the appropriate time and by the very contents of his own petition, it clearly appears that he did not meet that burden. Nor can it be said from the confines of this petition that he had shown in any respect that he had presented the trial court any justification or excuse for the absence of his attorney at the time in question. It is not believed that the trial court is required to delay the disposition of a case merely because defense counsel is absent when he should be present. It follows that if and when defense counsel is absent at a time when he should be present, and there is no justification or excuse advanced for his absence, a trial court does not deny due process of law if it proceeds without either awaiting the arrival of said counsel or appointing substitute counsel unless it appears the defendant is incompetent to represent himself in the particular case which is pending against him.

The statements attributed to the trial court by the instant petitioner clearly show that the court was of the opinion (obviously justified from the trial judges affidavit) that the petitioner was quite competent to represent himself in the proceedings. Whether that opinion was based on a personal acquaintance with and observation of the petitioner is not revealed by said petition.

However, it may fairly be said that whatever its basis may have been, the soundness of the trial court's opinion in that particular was not and is not challenged by said petition, which itself made no showing, claim or allegation that the petitioner was incompetent to represent himself by reason of youth, inexperience, ignorance, mental incapacity or any other suggested infirmity.

Further, the factual issue in the second offender prosecution against the petitioner was quite narrow and relatively simple. Under the applicable statute, Section 775.11, Florida Statutes, the only factual issue to be resolved in said prosecution was one of identity, that is to say whether the petitioner was the same person who had suffered the convictions alleged in the second offender information filed against him. There is no showing in the record and no allegation in the petition to the Supreme Court of Florida that the petitioner could not competently represent himself in a trial embracing that simple and uncluttered issue.

Nor did the petitioner contend in his petition to the Supreme Court of Florida that there was any meritorious legal point which a lawyer could have urged to the trial court in his defense. In this connection, it is respectfully observed that, by denying his petition, the said Supreme Court ruled against him on every legal question raised by his petition which could have been raised at the trial.

So it is that there was no showing before the Supreme Court of Florida or for that matter, an allegation, that the petitioner was not in any way competent to represent himself in the particular prosecution with which he was

confronted or that the trial court denied him due process of law when it proceeded without awaiting the arrival of alleged counsel who, for aught that appears, was absent without justification or excuse.

It only remains, from what has been set out above, to determine whether with the logical inferences which can be drawn and the natural progression which follows such inferences, petitioner was in fact the recipient of undue hardship (which he equates with the denial of due process) to such an extent as to deprive him of fundamental rights assured by law.

Let us assume arguendo that everything petitioner alleges relative to the issue of counsel is as he contends. Let us further assume that the exhibit lately tendered by petitioner (the one reflecting a letter from D. C. Laird, Attorney, Lakeland, Florida, to Mrs. Sadie M. Bradley) might lead one to believe that in fact some employment arrangement had either been made or discussed relative to the petitioner's plight. Does it not follow as the night the day that even if such arrangements had been made either prior to, during or subsequent to the proceedings in question, that counsel was not only fully capable but aware that with these particular circumstances he could have been assured that any motion to withdraw the plea of guilty entered by the petitioner

would have been granted as a matter of course by the trial judge in question?

That being so, and surely it must be, he had his counsel and could have achieved a satisfactory result by the simple advent of having his alleged counsel file a motion for leave to withdraw the plea of guilty setting out the particulars upon which he here relies.

It is respectfully submitted that such was an easy alternative, open either to the petitioner or to his counsel; if he ever had one, or to both of them. That he did not avail himself of his ready remedy is quite obvious.

Equally available to petitioner as an easy alternative to the allegedly harsh edict of the trial court (refusing to wait for his counsel), was the avenue of a plea of not guilty. This Court could take judicial knowledge of the state of trial court calendars. The entry of a plea of not guilty would have required petitioner's case to be set for trial at a time subsequent to said plea. That would have given said counsel time to arrive and function in such capacity as the circumstances indicated.

To the possible assertion that this is at best, hindsight, your respondent contends that if petitioner ever did say what he alleges he said to the trial court and if he ever did contract for legal representation with D. C. Laird, he did not do so simply to have counsel tell him to plead guilty. That much, he was infinitely better equipped to do (the charge being what it was) than any human being in existence. No one could know better than he, who he was. No one could know better than he, whether he had

suffered the two former felony convictions. That being the only avenue of inquiry, his personal knowledge thereof knew no equal. His legal need must therefore be considered in that light.

It is only necessary that we examine a totality of relevant facts, *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, in order to decide whether the lack of counsel introduced into the trial "an ingredient of unfairness" which actively operated in the process that resulted in the confinement of petitioner. *Foster v. People of State of Ill.*, 332 U.S. 134, 67 S.Ct. 1716, 1718, 91 L.Ed. 1955. As stated in *Quicksall v. People of State of Michigan*, 339 U.S. 660, 70 S.Ct. 910, 913, 94 L.Ed. 1188, it is only when denial of counsel suggests a "disregard of fundamental fairness" that a state of criminal proceeding will be invalidated by reason of the due process clause. The sum of all the precedents simply is that lack of counsel in state non-capital trials will be held fatal to a conviction, in a post conviction proceeding "only when the absence results in a denial to accused of the essentials of justice." *Gallegos v. State of Nebraska*, 342 U.S. 55, 72 S.Ct. 141, 147, 96 L.Ed. 86; also see, 93 L.Ed. 137; 94 L.Ed. 1193; and 96 L.Ed. 161.

Having drawn his pleadings (without exception, sans the benefit of counsel), with a degree of skill which rewarded him with one victory and (depending upon the outcome of this proceeding) possibly two, out of the three

which he filed, it would literally require the application of a judicial sorcerer's stone to his status at the time in question to produce in the minds of reasonable men a conclusion that, even in light of the law of due process as set out by this Court, this man was dealt with unfairly.

CONCLUSION

Wherefore it appears almost conclusively that no rights, assured petitioner by either Federal or Florida law, were denied him. The proceedings about which petitioner complains did no violence to his liberty which has not been recognized as valid and lawful in every pertinent way. It follows that the certiorari should therefore be denied.

Respectfully submitted,

H. G. COCHRAN, JR., Director,
Division of Corrections, State of Florida
Respondent

RICHARD W. ERVIN
Attorney General

GEORGE R. GEORGIEFF
Assistant Attorney General
Counsel for the Respondent

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Brief of the Respondent to Honorable Claude Pepper, Counsel for Petitioner, 1701 Meridian Avenue, Miami Beach, Florida, by mail, this_____day of February, 1961.

GEORGE R. GEORGIEFF
Assistant Attorney General
Of Counsel for the Respondent

FILE COPY

PETITION NOT PRINTED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 115

STEPHEN FRANKLIN REYNOLDS,

Petitioner,

vs.

H. G. COCHRAN, JR., Director of Division of Corrections, State of Florida.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER

CLAUDE PEPPER
1701 Meridian Avenue
Miami Beach, Florida
Counsel for Petitioner

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REPLY BRIEF OF PETITIONER

Respondent urges this Court to disregard the fact that Petitioner was denied the right to be heard through counsel since Petitioner did not spell out "any meritorious legal point which a lawyer could have urged to the trial court in his defense." Such a contention is, of course, absolutely untenable since Petitioner's right to be heard through his own counsel was unqualified (*Chandler* v. *Fretag*, 348 U.S. 3, 99 L. Ed. 4, 75 S. Ct. 1) and not conditioned upon the defenses that counsel might have been able to present. Respondent's reasoning seems to be that it was not only in accord with due process for the trial court to have denied Petitioner's request for a continuance so that he might have the benefit of skilled counsel but that it is also due process to deprive him of the right to be heard on his complaint of such denial since he himself did not have the legal skill

required to spell out in his Petition the precise legal points which a lawyer might have urged in his defense. Such fallacious reasoning, if allowed to prevail, would result in a travesty of the justice upon which our judicial system is founded.

Petitioner did assert that "he is being held, detained and deprived of his personal freedom without due process of law, further, that the trial court violated his constitutional rights and the fundamental fairness that is so essential to the very concept of justice." That assertion was sufficient to cause the Florida Supreme Court to consider whether the trial court was correct in declaring, "You do not need counsel in this case." However, had counsel been allowed to represent the Petitioner he might have pleaded the following meritorious defenses before the trial court:

1.

Invalidity of Arrest

First, counsel could have attacked the validity of Petitioner's arrest. The Florida Statutes provide for arrest (other than in specific cases not pertinent here), only after a valid warrant *charging a crime* has been issued. In *Roberts* v. *Dean*, 133 Fla. 47, 136 Fla. 421, 187 So. 571 (1938), and *Williams* v. *State*, 97 Fla. 401, 121 So. 462 (1929), the Florida Supreme Court clearly affirms the rule that a warrant of arrest in order to be valid, must sufficiently charge a criminal offense. Since the Second Offender Statutes admittedly do not create an offense (*McDonald* v. *Massachusetts*, 180 U.S. 311, 313, 42 L. Ed. 542, 547, 21 S. Ct. 389; *Graham* v. *West Virginia*, 224 U.S. 616, 623, 624, 56 L. Ed. 917, 920, 921, 32 S. Ct. 583), Petitioner was deprived of his freedom by his arrest on the basis of a warrant charging no crime whatsoever.

Section 775.11 Florida Statutes 1957 provides:

"... the Court ... shall cause said person, whether confined in prison or otherwise, to be brought before it ..."

Assuming that the above statute could validly authorize the Court to require a person who had not yet completed his prison sentence to come before it for re-sentencing, yet the phrase "whether confined in prison or otherwise" certainly cannot be validly interpreted to authorize the arrest of a person who has completed his sentence. There is nothing either in the body or the title to the Second Offender Statutes revealing that they were intended to constitute a legal basis for a valid warrant of arrest in derogation of the explicit requirement of Section 901.15 Florida Statutes 1957,[1] that an arrest on the basis of a warrant may be made:

"(4) When a warrant has been issued *charging any criminal offense* and has been placed in the hands of any peace officer for execution." (Emphasis supplied.)

2.

Right to Construction of Sections 775.09 and 775.11 Florida Statutes by Supreme Court of Florida.

Respondent assumes that the result of Section 775.11, Florida Statutes, 1957, is to remove any time limitation whatsoever against the filing of a Second Offender Information. This assumption is not only unwarranted but completely erroneous in view of the Florida Supreme Court's own expression on that point in the two cases where it considered the problem.

In *State* v. *Nelson*, 160 Fla. 744, 37 So. 2d 427 (1948) the Court said:

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[1] Sec. 901.15 (2 Fla. Stat. 1957, p. 2911, Sec. 901.15).

> "Whether or not in this jurisdiction there is any limitation of time on the Court's power to impose sentence as provided by Section 775.09 supra, it is our conclusion that under the facts and circumstances it has not expired in this instance."
>
> 37 So. 2d p. 429.

The Florida Supreme Court in *Milan* v. *State of Florida*, 102 So. 2d 595 (1958) again pointed out that it has not decided whether there is a time limitation on the imposition of a sentence under Section 775.09:

> "The first of the above questions as posed is not before the Court because there is no showing that appellant had actually served his entire sentence for the second offense before the amended information was filed charging him with being a second offender. *On this question there is a difference of opinion among the members of the Court, but as it is not ripe for determination under the record here, no useful purpose could be served by discussing it.*" (Emphasis supplied.)
>
> 102 So. 2d at p. 596.

The question, therefore, as to whether §775.11, Florida Statutes, 1957, should be literally interpreted so that the phrases "at any time after sentence or conviction" and "whether confined in prison or otherwise" mean at any time even after the last sentence has been fully served (whether three months or fifty years), has not been decided by the Florida Supreme Court, and Petitioner had a right to have this question answered by the highest court of this state before such a literal interpretation could be assumed. In view of the fact that the Florida Supreme Court specifically refrained from deciding this question in the two cases cited above, the Court certainly could not have intended

to answer this question by a per curiam denial of Petitioner's Petition for Writ of Habeas Corpus, where there were no briefs, there was no argument, no counsel, nor even a hearing.

3.

Questions of the Constitutionality of Sections 775.09 and 775.11 Florida Statutes 1957 Under the Constitution of Florida.

The constitutionality of Sections 775.09 and 775.11 Florida Statutes, 1957, as applied to the facts in Petitioner's case is questionable by reason of the following:

The Constitution of the State of Florida requires that all legislative bills must contain only one subject, that subject must be indicated in the title, and any statute being amended must be published at length; otherwise the bill is void.[2]

The title to *Chapter 12022, Laws of Florida 1927* which is the forerunner of Sections 775.09, 775.10 and 775.11, Florida Statutes, 1957 as enacted in 1927 read:

> "An Act Prescribing Punishment for Persons Who Have Been Twice Convicted of a Felony, and Prescribing Punishment for Persons Who Have Been Convicted Four Times for a Felony and Prescribing Procedure in Such Cases."

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[2] Section 16, Article III, Florida Constitution (Vol. 3, Fla. Statutes 1957, p. 3061, Section 16):

> "Acts; one subject; expressed in title; amendments.—Each law enacted in the Legislature shall embrace *but one subject* and matter properly connected therewith, which subject shall be briefly *expressed in the title*, and no law shall be amended or revised (by reference) to its title only; but in such case the act as revised or section . . . as amended *shall be re-enacted and published* at length." (Italics supplied.)

Since the purpose of Section 16, Article III, Florida Constitution, is to prevent surprise or fraud upon the people and to give notice to the Florida Legislature of the provisions in the body of a bill, it is obvious that the title to the Florida Second Offender Act, quoted above, does not fulfill that purpose. This title merely gives notice of enhanced punishment for second and fourth offenders. The words "prescribing procedure" give no indication of the substantive matters contained in the body of the bill, and are therefore gravely misleading.

The substantive rights affected by the body of the bill are the right of a person to be sentenced only by a Court having jurisdiction of the subject matter of the crime for which the accused is convicted and sentenced and the right to be free from arrest unless the warrant issued charges a crime (or unless the arrest is otherwise valid under applicable laws not pertinent herein).

Sec. 775.01 F.S. 1957 provides:

"*Common Law of England*—

> The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this State where there is no existing provision by statute on the subject."

Under the common law of England in relation to crimes the moment that sentence was pronounced there remained only a ministerial duty of overseeing the execution of the sentence and the courts thereupon lost jurisdiction of the subject matter of that crime. The mere inclusion of the words "at any time" in the Florida Second Offender Statute does not give notice that this statute was intended to give jurisdiction to a court that had long before lost jurisdiction

of the subject matter of a second offense. Certainly the abrogation of such a substantive right would require notice to the people and to the legislature of the amendment of Section 775.01 Florida Statutes, and the specified requirements of Section 16, Article III, Florida Constitution would have to be followed.

Chapter 901, Florida Statutes specifically provides that a warrant of arrest may be issued only where there is reasonable ground to believe that an offense has been committed, specifies that the warrant shall set forth substantially the nature of the offense, and provides that arrest by an officer without a warrant is lawful under certain circumstances not relevant to the instant case and also when a warrant has been issued *charging any criminal offense* and has been placed in the hands of any peace officer for execution. The mere inclusion of the words "whether confined in prison or otherwise" in Sec. 775.11, F.S., 1957 cannot validly be construed to vitiate the express requirements of Chapter 901, Florida Statutes, for such a construction contemplates a drastic abridgment of substantive rights.

The phrases "at any time" and "whether confined in prison or otherwise," therefore, as interpreted by Respondent, render Sec. 775.11 unconstitutional, since they are in conflict with other existing statutory provisions which are not specifically amended by the Second Offender Act and since they constitute two additional subjects in the Second Offender Act, contrary to the provisions of Section 16, Article III of the Florida Constitution.

In *State* v. *Tindell*, Fla., 88 So. 2d 123 (1956) an act relating to the prosecution of homicides by the State Attorney was held unconstitutional by the Florida Supreme Court because the subject matter was broader in scope than was indicated by the title. In *Copeland* v. *State*, Fla., 76 So.

2d 137 (1954) the Florida Supreme Court held that so much of the Child Molester Act of 1953 as applied to rape and the penalty therefor violated Section 16, Article III of the Florida Constitution because (1) the Act embraced eleven different crimes denounced by other statutes of the State of Florida, (2) it did not publish at length the statutes with reference to rape which it attempted to amend, and (3) the title of the Act was insufficient to give notice that one of the purposes of the Act was to change the penalty for rape under certain circumstances. Under the rationale of the *Tindell* and *Copeland* cases, the Second Offender Act of Florida, Sections 775.09 through 775.11, if given the literal interpretation urged by Respondent, must be held to violate Section 16, Article III of the Florida Constitution inasmuch as:

1. The title of the Act is insufficient to give notice of the abridgment of substantive rights that the statute contains.

2. The Act embraces at least three different subjects, i.e. (a) enhancement of the penalty for second and subsequent offender, (b) enlargement of the jurisdictional power of criminal courts, and (c) validity of arrest on the basis of a warrant not charging an offense.

3. The bill enacting the Florida Second Offender Act does not publish the statutes with reference to abrogation of the common law and with reference to the prerequisites for a valid arrest which it attempts to amend.

4.

Due Process

The Florida Second Offender Act as applied to the Petitioner, who had completely served the second sentence imposed upon him, violates the due process clause of the

Constitution of the United States. It is not due process for the State of Florida, in the absence of any evidence that the Petitioner concealed his identity and in view of the ready availability of the record of the first conviction of Petitioner in the same county in which the second conviction occurred, to postpone any action against Petitioner under the Second Offender Act until he had completely served his second sentence and had been at liberty for three months. Such a case offends against the concept that one of the primary reasons for punishment is rehabilitation. It should be considered that the Supreme Court of Florida in the instant case, in view of the previous division in the Court and the failure of the Court to decide the question, has not construed the Florida Second Offender Act; it is therefore submitted that this Honorable Court should so construe the statute as not to apply to the Petitioner under the circumstances of this case in order to avoid its unconstitutionality under the due process clause.

Conclusion

Thus contrary to Respondent's assertions in his brief, had Petitioner been granted a continuance so that he might have had benefit of counsel, he could have, through counsel, asserted the foregoing defenses. To assert, therefore, that the only issue involved was whether or not the Petitioner had suffered the two prior convictions alleged in the Information of Second Offender, and that his legal need must be considered only in that light, is in itself a perpetuation of the attitude of the trial Judge who convicted Petitioner without regard to his statutory or constitutional rights. Respondent's hindsight (using the term he himself suggests) as to what Petitioner might have done though his counsel *after conviction* lacks persuasion and is immaterial. Petitioner having the right to be heard through counsel, he had that right *before* conviction.

It takes no "judicial sorcerer's stone" but requires only the concept of fair play to realize that in the light of the many defenses available to Petitioner, Petitioner was denied the protection to which he was constitutionally entitled under the due process clause of the Fourteenth Amendment to the United States Constitution—the right to be heard through counsel.

Respectfully submitted,

CLAUDE PEPPER
1701 Meridian Avenue
Miami Beach, Florida
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

No. 115.—October Term, 1960.

Stephen Franklin Reynolds, Petitioner. v. H. G. Cochran, Jr., Director of Division of Corrections, Florida.	On Writ of Certiorari to the Supreme Court of Florida.

[March 20, 1961.]

Mr. Justice Black delivered the opinion of the Court.

In 1956 petitioner was convicted of grand larceny in the Criminal Court of Polk County, Florida, and sentenced to serve two years in prison. In December 1957, with time for good behavior, petitioner was released from prison and discharged from custody as an absolutely free man. Some two months after his release and discharge, the Polk County prosecutor filed an information against petitioner charging that he "has been convicted of two (2) felonies under the laws of the State of Florida, contrary to Section 775.09, Florida Statutes, 1957 [1] . . . and against the peace and dignity of the State of Florida." The two convictions referred to were the 1956 conviction for grand larceny and a 1934 conviction for robbery for which peti-

[1] "A person who, after having been convicted within this state of a felony or an attempt to commit a felony, or under the laws of any other state, government or country, of a crime which, if committed within this state would be a felony, commits any felony within this state is punishable upon conviction of such second offense as follows: If the subsequent felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then such person must be sentenced to imprisonment for a term no less than the longest term nor more than twice the longest term prescribed upon a first conviction. . . ." Fla. Stat., 1957, § 775.09.

tioner had also completely served his sentence. Upon the filing of this information, petitioner was promptly arrested, arraigned and, according to the judgment of the trial court, "did then and there freely and voluntarily plead guilty to the Information filed." The court then proceeded to find petitioner "guilty of the offense of Second Offender" and ordered that for "said offense, [he] be confined in the State Prison of Florida at hard labor for a term of Ten (10) Years." [2] Petitioner later brought this original petition for habeas corpus in the Supreme Court of Florida challenging his confinement under this judgment on the ground that it was not authorized by the Florida second-offender statute and that it violated both the State and the Federal Constitution in several different respects. Despite the fact that none of the charges made by petitioner were denied by the State, the Florida court dismissed his petition without a hearing.[3]

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[2] The theory used by the State in its proceedings against petitioner, as disclosed by the quoted recitals of the information and judgment, seems to be completely at variance with that upon which multiple-offender proceedings are normally based. For normally the punishment provided for in a multiple-offender statute is viewed as increased punishment for the last offense in the sequence. Here, on the other hand, the theory seems to have been that petitioner, by virtue of his convictions for two previous offenses, has committed a third and entirely separate offense—to quote the judgment, "the offense of Second Offender." Because of the disposition we make of this case on other grounds, however, we need not reach the questions posed as to the constitutionality of confinement based upon such a theory. In any event, prior opinions of the Supreme Court of Florida indicate that there might be room for considerable doubt whether § 775.09 authorizes confinement on such a theory. See *Cross* v. *State*, 96 Fla. 768; *Washington* v. *Mayo*, 91 So. 2d 621.

[3] The Supreme Court of Florida issued no opinion, the case being disposed of with the following order: "The above-named petitioner has filed a petition for writ of habeas corpus to be issued to the respondent in the above entitled cause, and upon consideration thereof, it is ordered that said petition be and the same is hereby denied."

We granted certiorari to consider the correctness of this peremptory denial of the petition in view of the serious nature of the charges made.[4]

Since it is conceded by the State that the federal questions presented here were properly raised and passed on below, and since it is clear that for the purposes of this proceeding the facts set forth by petitioner must be accepted as true,[5] we go directly to the charges made in the petition. Those charges were clearly stated by petitioner himself in the following excerpt from his rather crudely drawn application for habeas corpus:

> "Your petitioner would show this Honorable Court that at the time of his arrest he was living in Valusia County, DeLand Florida, that he was arrested without a warrant, that he was arrested on strength of a pick up order from Sheriff Office, Bartow, Polk County, Florida, that the arresting officer, a deputy sheriff of Volusia County did not know why he was arresting your petitioner and did not have a warrant to make a legal arrest, further that your petitioner was taken against his will across five (5) county lines. The said county lines being Volusia, Seminole, Orange, Osceala, into Polk County all of the State of Florida, without his knowing why he was arrested or the arresting officer knowing why or what charge he was making arrest for; Your petitioner was taken across the afore said counties by the arresting officer, a deputy sheriff of Volusia County, Florida.
>
> "Your petitioner contends that once he was in the clutches of the Criminal Court of Record in and for Polk County Florida; he was a convicted person before he was ever tried.

[4] 363 U. S. 801.

[5] *Cash* v. *Culver*, 358 U. S. 633, 634; *Hawk* v. *Olson*, 326 U. S. 271, 273.

"To support the above statement your petitioner would show that he was forced to go before the court against his will; that once before the court your petitioner informed the court that he then had legal counsel on the way to represent him in what ever charge may be; a better description of afore said known by Mrs. Sadie M. Bradley, 317 West Minncasata Avenue, DeLand Volusia County, Florida, and, D. C. Laird; attorney at Law, Lakeland Polk Florida. That petitioner had been arrested on the 18th day of February 1958 in Valusia County, and his attorney was to arrive this morning this date being the 20th day of February 1958, that after being so informed 'the trial court so stated to your petitioner 'you do not need counsel in this case.' Counsel would not be of any assistance you your petitioner, 'No point in calling a Doctor to a man already dead.'

"The trial court then proceeded to read off two (2) convictions from your petitioners record and then asked, You are guilty of these two convictions, are you not? Petitioner saying yes your Honor, but the court, I find, you guilty of being a 'second offender' and sentence you Stephen Franklin Reynolds to ten (10) years in State Prison . . . ."

On the basis of these facts, petitioner contends, among other things, that his confinement is not authorized by the Florida second-offender statute because he had already served the sentences imposed upon each of his prior convictions,[6] and that such confinement violates

[6] Section 775.09, set forth in n. 1, *supra*, is supplemented by a provision which, on its face at least, appears to condone imposition of second-offender penalties even at such a late date: "If *at any time* after sentence or conviction it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth either in § 775.09 or § 775.10 the prosecuting attorney of the county in which such conviction was had, shall file an information accusing

the state and federal constitutional prohibitions against *ex post facto* laws and against double jeopardy. It would, of course, be entirely inappropriate under the circumstances of this case for this Court to consider the questions posed under state law. Nor do we find it necessary to consider these particular questions raised under the Federal Constitution beyond the observation that they certainly cannot fairly be characterized as frivolous.[7] For we think it clear that this case must be reversed for a hearing in order to afford petitioner an opportunity to prove his allegations with regard to another constitutional claim—that he was deprived of due process by the refusal of the trial judge to grant his motion for a continuance in order that he might have the assistance of the counsel he had retained in the proceeding against him.[8]

In *Chandler* v. *Fretag*,[9] we made it emphatically clear that a person proceeded against as a multiple offender has a constitutional right to the assistance of his own counsel

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said person of such previous convictions, whereupon the court in which such conviction was had shall cause said person, *whether confined in prison or otherwise*, to be brought before it and shall inform him of the allegations contained in such information and of his right to be tried as to the truth thereof, according to law, and shall require such offender to say whether he is the same person as charged in such information or not." Fla. Stat., 1957, § 775.11. (Emphasis supplied.)

[7] The problem presented by these questions is rather dramatically stated by petitioner himself in his petition for habeas corpus: "In the instant case how can your petitioner know when in his life he is no longer subject to have his liberty translated to imprisonment, even after expiration of the present sentence, can he again be imprisoned without committing another crime as in the instant case? Surely this Honorable Court will not condone this practice . . . ."

[8] As in *Chandler* v. *Fretag*, n. 9, *infra*, the petitioner here also alleged a denial of due process in that he was not given pretrial notice of the charge against him. But as in *Chandler*, we find it unnecessary to pass upon this contention. See 348 U. S. 3, 5–6, n. 4.

[9] 348 U. S. 3.

in that proceeding. Under the facts of this case, as alleged in the petition filed before the Florida Supreme Court, the decision in *Chandler* is squarely in point and controlling. Under those facts, the statement of this Court in *Powell v. Alabama*,[10] which provided the basis of our holding in *Chandler*,[11] is wholly applicable: "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

The State seeks to avoid the application of the holding in *Chandler* on the basis of a contention that even if it was error for the trial judge to deny petitioner's motion for a continuance, that error was harmless under the facts of this case. The argument offered in support of this contention is that since petitioner admitted the only fact at issue in the proceeding—that he had been convicted of a previous felony in 1934 as charged in the information—a lawyer would have been of no use to him. We find this argument totally inadequate to meet the decision in *Chandler*. Even assuming, which we do not, that the deprivation to an accused of the assistance of counsel when that counsel has been privately employed could ever be termed "harmless error,"[12] it is clear that such deprivation was not harmless under the facts as presented in this case. In the first place, petitioner asked for a continuance to enable him to consult with counsel before he admitted the truth of the charge of prior felony conviction. Thus, if petitioner had been allowed the

[10] 287 U. S. 45, 69.

[11] 348 U. S., at 9–10.

[12] It is significant that in *Chandler* we did not require any showing that the defendant there would have derived any particular benefit from the assistance of counsel.

assistance of his counsel when he first asked for it, we cannot know that counsel could not have found defects in the 1934 conviction that would have precluded its admission in a multiple-offender proceeding.[13]

Secondly, and perhaps even more importantly, the State's contention that this factual issue was the only issue in the proceeding seems to constitute an oversimplification of the matter. For, in addition to the constitutional issues mentioned above, able counsel appointed to represent petitioner in this Court has also pointed out that the proceeding involved a difficult question of statutory construction under Florida law. Counsel has pointed out, for example, that the Florida Supreme Court has never had occasion to pass upon the question whether the second-offender statute may be applied to reimprison a person who has completely satisfied the sentence imposed upon his second conviction and has been discharged from custody. In one case in which that question was argued, the Florida court found that it was not properly presented by the facts of the case before it and then went on to say: "On this question there is a difference of opinion among the members of the Court but, as it is not ripe for determination under the record here, no useful purpose could be served by discussing it."[14] Moreover, another decision of that court has indicated that the statute permitting the filing of an information against a second offender "at any time"[15] would not necessarily be interpreted so mechanically as to allow

[13] The proof of prior convictions in a second-offender proceeding may raise difficult evidentiary problems. See, *e. g.*, *Sharpa* v. *State*, 102 So. 2d 809. Moreover, it can be presumed that if an accused second offender were able to make a successful collateral attack upon his first conviction, § 775.09 would not be applied. Cf. *Fields* v. *State*, 85 So. 2d 609.

[14] *Milan* v. *State*, 102 So. 2d 595, 596.

[15] See n. 6, *supra*.

the second-offender statute to hang over a defendant's head to the end of his natural life.[16]

We of course express no opinion as to how this question of statutory construction should eventually be decided by the Florida courts. But its mere existence dramatically illustrates that even in the most routine-appearing proceedings the assistance of able counsel may be of inestimable value. Plainly, such assistance might have been of great value to petitioner here. The allegations of his petition for habeas corpus indicated, if true, that he had been denied the assistance of counsel he had retained. He is entitled to a hearing to establish the truth of those allegations. The case must therefore be and is reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

[16] In *Ard* v. *State*, 91 So. 2d 166, the Florida Supreme Court held that the second-offender statute did not apply to a person who had concededly committed two felonies but who had been on probation for five years between the date of his conviction of the second felony and the filing of the second-offender information.